No. 12,139

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Angel L. Pack,

Appellant,

vs.

United States of America, and Lilly Pack,

Appellees.

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA.

James M. Carter,
United States Attorney,

Ernest A. Tolin,
Assistant United States Attorney,

Clyde C. Downing,
Assistant United States Attorney,

Robert Komins,
Assistant United States Attorney,

600 Federal Building, Los Angeles 12,

H. G. Morison,
Assistant Attorney General,

D. Vance Swann,
Attorney, Department of Justice,

Thomas E. Walsh,
Attorney, Department of Justice.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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UNITED STATES OF AMERICA, and LILLY PACK,

Appellees.

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA.

Jurisdiction.

The jurisdiction of the District Court is founded upon Section 617 of the National Service Life Insurance Act of 1940, as amended (38 U. S. C., Sec. 817), which incorporates by reference Section 19 of the World War Veterans' Act, as amended (38 U. S. C., Sec. 445), vesting Federal District Courts with jurisdiction to entertain suits upon Government insurance contracts in the event of a disagreement as to a claim under the contract.

The plaintiff brought this suit on a $10,000 contract of National Service Life Insurance issued to her husband, Clyde A. Pack, while in the naval service, alleging, in Paragraph VIII of her complaint, that a claim for insurance, which she had presented to the Veterans' Administration on August 25, 1947, had been denied, and that a disagreement existed between her and the United States.

[R. 4.] These allegations as to the existence of a disagreement such as required to vest the court with jurisdiction were admitted in Paragraph V of the answer filed by the United States. [R. 8-9.] The allegations with respect to the existence of a disagreement before suit were also stipulated to be true. [R. 34.]

The jurisdiction of this court to entertain the appeal is likewise conferred by Section 617 of the National Service Life Insurance Act of 1940, as amended (38 U. S. C., Sec. 817), and Section 19 of the World War Veterans' Act, as amended (38 U. S. C., Sec. 445).

Statement of the Case.

The undisputed facts show that Clyde A. Pack (the insured) enlisted in the United States Marine Corps on February 25, 1944, and while in active service applied for and was granted a $10,000 contract of National Service Life Insurance, effective March 6, 1944, designating the appellee, Lilly Pack, his mother, as the beneficiary thereof. The contract was kept in force by the payment of monthly premiums, deductions being made from the insured's pay while in the naval service, and was in force on the date of his death, June 11, 1945.

The insured did not change the beneficiary of his National Service Life Insurance after designating his mother as beneficiary in the original application.

After the insured's death, claims for insurance were presented to the Veterans' Administration by Angel L. Pack, the appellant herein, and by Lilly Pack, appellee. The Veterans' Administration denied the claim of the appellant and allowed the claim of the appellee, Lilly Pack, as the

designated beneficiary, but has made no payments thereunder because of this litigation.

In her complaint appellant sought a recovery of the proceeds of the National Service Life Insurance contract issued to her husband, on the theory (1) that she was designated the beneficiary subsequent to the issuance of the insurance, or (2) if it was determined that she was not the designated beneficiary, that she was entitled to a one-half interest in the said insurance, under and by virtue of the community property laws of the State of California. [R. 2-7.] The answer filed by the United States denied that the appellant was entitled to a recovery under either theory. [R. 7-11.] The answer and cross-complaint of the appellee, Lilly Pack, denied that the appellant was entitled to a recovery and set forth her claim to the proceeds of the insurance as the designated beneficiary. [R. 11-16.]

The case was tried before the Honorable Ben Harrison, District Judge, after a jury had been waived, and he gave judgment against the appellant and in favor of the appellee, Lilly Pack [R. 28-30], rendering findings of fact and conclusions of law in support thereof [R. 19-28], finding that the appellee, Lilly Pack, was the designated beneficiary and the person entitled to the proceeds of the insurance contract; that the appellant had never been designated as the beneficiary and was not entitled to a share in the insurance proceeds, under or by virtue of the community property laws of the State of California. He concluded as a matter of law that the insurance was issued under the National Service Life Insurance Act, as amended; was not

subject to and could not be controlled or governed by the community property laws of the State of California, and that the community property laws of the State of California could not and did not change the terms of the policy of insurance sued upon. [R. 26-27.] The judgment was entered September 22, 1948, and the present appeal filed November 19, 1948. [R. 30.]

Summary of Argument.

I.

National Service Life Insurance contracts were authorized by Act of Congress and are contracts of the United States, not subject to community property laws of the State of California.

II.

A trust may not be impressed upon National Service Life Insurance by virtue of the community property laws of the State of California. The National Service Life Insurance Act contains no provision for the creation of a trust and the provisions of the Act are inconsistent with the creation of a trust. None of the elements of a trust were shown to exist in this case. An assignment of National Service Life Insurance was expressly prohibited at the time this insurance contract matured and, under the amendatory Act permitting voluntary assignments under stated conditions, the appellee may not be compelled to assign any portion of the insurance for which she was the designated beneficiary.

ARGUMENT.

I.

National Service Life Insurance Contracts Were Authorized by Act of Congress and Are Contracts of the United States, Not Subject to Community Property Laws of the State of California.

National Service Life Insurance contracts were authorized by the National Service Life Insurance Act, passed by Congress on October 8, 1940 (38 U. S. C. A., Sec. 801); the provisions of that Act, as amended, govern the designation of beneficiaries and payment of insurance proceeds thereunder, and are not subject to and may not be controlled, modified or changed by the community property laws of the State of California. *Barton v. United States,* 75 Fed. Supp. 703 (S. D. Calif.); *Johnson v. Shelton,* Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles). (Appendix, *infra.*) In the *Barton* case, the court said (pp. 705, 706):

> Whether state law can control disposition of proceeds of policies issued pursuant to the National Service Life Insurance Act of 1940, 38 U. S. C. A., Secs. 801-818, depends upon the intent of Congress; for it is clear that the Act, being a constitutional exercise of powers granted to Congress, * * * is "Supreme Law of the Land" * * * if Congress so willed. * * *.
>
> * * * * * * * *
>
> I therefore conclude that Congress left no room for the application of state law to rights arising under policies issued pursuant to the National Service Life Insurance Act of 1940, as amended, 38 U. S. C. A., Secs. 801-818. It follows then that California's community property law, [Cal. Civ. Code, Sec. 164], can

confer no right on plaintiff to share in the proceeds of the policy at bar.

My learned colleague Judge Harrison so held with respect to the community property law of Texas in *James v. United States, et al.*, D. C., S. D. Cal., 1947.

* * * * * * * *

Also, as stated in *Johnson v. Shelton, supra:*

> In the case before us the policy of insurance was issued by the Federal Government pursuant to a Congressional act. To the extent then that any State law conflicts with this act of Congress it is of necessity void and of no effect. * * *

Similar rulings have been rendered without opinions by United States District Judge Ben Harrison, in *James v. United States, et al.*, No. 6061-BH, on June 16, 1947 (Appendix); by Judge Campbell E. Beaumont, in *Rhodes v. United States, et al.*, No. 5845-B, and by Judge Jacob Weinberger, in *Hayek v. Hayek and United States,* No. 7400-W, all decided in the District Court of the United States for the Southern District of California; and by the Superior Court of the State of California in and for the County of Los Angeles, in *Nobles v. Cannell,* No. 502-587. There are no Federal Court decisions to the contrary of which we are aware.

Government insurance contracts are contracts of the United States (*Lynch v. United States,* 292 U. S. 571), and their construction presents questions of Federal law not controlled by the law of any State. *Woodward v. United States,* 167 F. 2d 774 (C. C. A. 8th); *Cassarello v. United States,* 271 Fed. 486 (M. D. Pa.), affirmed, 279

Fed. 396 (C. C. A. 3d); *United States v. County of Allegheny,* 322 U. S. 174, 183; *Clearfield Trust Co. v. United States,* 318 U. S. 363. As stated in *Woodward v. United States, supra* (pp. 778-779):

> Policies of National Service Life Insurance are, of course, contracts of the United States and possess the same legal incidents as other government contracts. *Lynch v. United States,* 292 U. S. 571, 576, 54 S. Ct. 840, 78 L. Ed. 1434. The validity and construction of such policies present questions of federal law. *Clearfield Trust Co. v. United States,* 318 U. S. 363, 366, 63 S. Ct. 573, 87 L. Ed. 838; *United States v. County of Allegheny,* 322 U. S. 174, 183, 64 S. Ct. 908, 88 L. Ed. 1209.

Also, in *United States v. Fuller,* 97 F. 2d 541 (C. C. A. 5th), involving a war risk insurance contract, the court pointed out (p. 542):

> Such claims have their basis and foundation in the Federal statutes, which, creating the claims and the conditions under which they may be maintained, completely govern and control their presentation as claims, and suits brought upon them, against the United States. (Cases cited.) * * *.

Under the provisions of Section 602(g) (38 U. S. C. A., Sec. 802(g)), the insured had the right to designate the beneficiary of his National Service Life Insurance contract within a restricted class of beneficiaries, and the right to change the beneficiary, without the beneficiary's consent. The section reads as follows:

> (g) The insurance shall be payable only to a widow, widower, child (including a stepchild or an illegitimate child if designated as beneficiary by the insured), parent, brother or sister of the insured.

> *The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided:* * * *. (Italics supplied.)

This was one of the important provisions of the contract[1] which the insured entered into with the United States when he applied for National Service Life Insurance, and his designation of the appellee, Lilly Pack, his mother, as the beneficiary, without any change having been made during his lifetime, should control in the payment of insurance benefits. As pointed out by the District Judge:

> I feel that it was quite a solemn pact the Government made with the members of the armed forces, that they provide insurance for their named beneficiaries. I feel that that was a solemn obligation on the part of the Government. I am going to direct that the proceeds of the policy be paid to the mother, from the proceeds of the policy itself. * * *. [R. 36.]

Under Government insurance contracts, the only relations of contract are between the Government and the insured, the beneficiary being a volunteer. *White v. United States,* 270 U. S. 175; *Von Der Lippi-Lipski v. United States,* 4 F. 2d 168 (App. D. C.); *United States v.*

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[1]The contract provisions are found in the Act, the amendments thereto and the regulations promulgated thereunder. *White v. United States,* 270 U. S. 175; *Lynch v. United States,* 292 U. S. 571; *Wilner v. United States,* 292 U. S. 571.

Sterling, 12 F. 2d 921 (C. C. A. 2d). As stated in *White v. United States, supra* (pp. 180-181):

> The only relations of contract were between the Government and him. White's mother's interest at his death was vested only so far as he and the Government had made it so, and was subject to any conditions upon which they might agree. They did agree to terms that cut her rights down to one-half. She is a volunteer and she cannot claim more. See *Helmholz v. United States,* 294 Fed. 417, affirming 283 Fed. 600. *Gilman v. United States,* 294 Fed. 422, affirming 290 Fed. 614.

Appellant, who admittedly was not designated as beneficiary, had no relations of contract with the Government and could occupy no better position than the named beneficiary.

Although appellant alleged in her complaint [par. VI, R. 3-4] that, subsequent to March 6, 1944, and during his lifetime, "said Clyde A. Pack changed the beneficiary under all of the aforesaid insurance to plaintiff and designated plaintiff the sole beneficiary thereof," this claim appears to have been abandoned on this appeal, in view of the statement made by appellant in her brief (p. 3) that "Clyde at no time executed any change of beneficiary." In any event, there was no evidence to show a formal change of beneficiary in her favor and no evidence introduced from which a change of beneficiary might be established, under the rule announced in a number of recently decided cases, to the effect that a change of beneficiary may be shown where the evidence establishes an intention on the part of the insured to change the beneficiary, together with evidence of an act or action accomplishing

such a change. *Kendig v. Kendig,* 170 F. 2d 750 (C. C. A. 9th); *Mitchell v. United States,* 165 F. 2d 758 (C. C. A. 5th); *Roberts v. United States,* 157 F. 2d 906 (C. C. A. 4th), certiorari denied, 330 U. S. 829; *Collins v. United States,* 161 F. 2d 64 (C. C. A. 10th), certiorari denied, 331 U. S. 859; *Bradley v. United States,* 143 F. 2d 573 (C. C. A. 10th), certiorari denied, 323 U. S. 793; *Shapiro v. United States,* 166 F. 2d 240 (C. C. A. 2d), certiorari denied, 334 U. S. 859; *Rosenschein v. Citron,* 169 F. 2d 885 (App. D. C.).

That the community property laws of a state may not be invoked to change, modify or alter the provisions of a National Service Life Insurance contract, is implicit in Section 454a, Title 38, U. S. C. A., which is made applicable to National Service Life Insurance by Section 816, Title 38, U. S. C. A., and which provides, in part, as follows:

> Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, *and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.*[2] * * *. (Italics supplied.)

The section has been construed as having this effect in *Barton v. United States, supra,* and *Johnson v. Shelton,*

[2]Comparable provisions have been in effect for years in relation to Government insurance contracts issued pursuant to earlier legislation (38 U. S. C. A., Sections 454 and 454a), and have been enforced. *Perrydore v. Hester,* 110 So. 403; *Mixon v. Mixon,* 166 S. E. 516; *City of Atlanta v. Stokes,* 165 S. E. 270; *Wilson v. Sawyer,* 6 S. W. 2d 825.

supra, and with respect to similar benefits in *Lawrence v. Shaw,* 300 U. S. 245; *Pagel v. Pagel,* 291 U. S. 473; *Lewis v. United States,* 56 F. 2d 563 (C. C. A. 3d); and *Culp v. Webster,* 25 Cal. App. 2d Supp. 759, 70 P. 2d 273.

The Act shows a Congressional intent to foreclose the application of State statutes in another respect, Section 602(i) (38 U. S. C. A., Sec. 802(i)) providing:

> The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance and any installments not paid to a beneficiary during such beneficiary's lifetime shall be paid to the beneficiary or beneficiaries within the permitted class next entitled to priority, as provided in subsection (h) of this section. * * *.

If National Service Life Insurance is community property, it would then become the absolute property of the appellant, contrary to the aforementioned section, which expressly prohibits her from having any vested right in such insurance. And if the appellant was named beneficiary in the first instance, the only right she would have under this section would be a right to the monthly payments as they became due, conditioned upon her being alive to receive such payments.

The Act also specifically prohibits payment of the benefits to the heirs or legal representatives as such of either the insured or the designated beneficiary, showing a Congressional intention not to subject National Service Life Insurance in any way to State statutes of inheritance or

devolution, Section 602(j) (38 U. S. C. A., Sec. 802(j)) providing:

> No installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or of any beneficiary, and in the event that no person within the permitted class survives to receive the insurance or any part thereof no payment of the unpaid installments shall be made, * * *.

Other provisions of the National Service Life Insurance Act indicating a Congressional intent to provide a completely integrated Federal plan of insurance for members of the armed forces, to be administered on a National scale free from State jurisdiction or control, are (1) the provision directing the Administrator of Veterans' Affairs to administer the Act and conferring authority to promulgate regulations for that purpose;[3] (2) the provision that the United States should bear the costs of administration;[4] (3) the provision that the United States should bear the excess mortality costs and cost of waiver of premiums due to the extra hazards of military or naval service;[5] (4) the provision for a National Service Life Insurance appropriation for the payment of liabilities;[6] and (5) the provisions for the creation in the Treasury Department of the National Service Life Insurance trust fund and the

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[3]Section 608 (38 U. S. C. A., Sec. 808).

[4]Section 606 (38 U. S. C. A., Sec. 806).

[5]Section 607 (38 U. S. C. A., Sec. 807).

[6]Section 604 (38 U. S. C. A., Sec. 804).

setting aside of reserves to meet all liabilities.[7] In *Barton v. United States, supra* (p. 705), it was pointed out:

> The cited provisions are persuasive that it was the purpose of Congress to provide in all details for the issuance and administration and settlement of service life insurance on a national basis, as the title of the Act implies. (Cases cited.)
>
> * * * * * * * *
>
> Government insurance differs greatly from commercial insurance, in that a substantial part of the cost of providing this protection is borne by the United States, whereas the premiums charged an insured by a commercial insurance company cover the cost of the protection afforded, and the insurance is thus considered to be the joint property of the insured and his beneficiary. As stated in *White v. United States, supra* (p. 180):

> The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right to it and the relation of the Government to them if not paternal was at least avuncular. It was a relation of benevolence established by the Government at considerable cost to itself for the soldier's good. * * *.

See also,

Lynch v. United States, 292 U. S. 571.

The engrafting of State community property laws on National Service Life Insurance contracts would mean that veterans residing in states which have community property laws would be denied the absolute right to designate the beneficiary, which veterans living in other states clearly possess under the Act. Manifestly, Congress did not intend to discriminate against these veterans, but in-

[7]Section 605 (38 U. S. C. A., Sec. 805).

tended the National Service Life Insurance Act to have uniform application. *Barton v. United States, supra; Beach v. United States,* 79 Fed. Supp. 747 (N. D. Ohio). In any event, such an intention to discriminate should not be imputed to the Congress in the absence of language in the statute expressly so providing.

While the appellant contends that the premiums upon this insurance were paid out of earnings which were community property, and the court so found, the premiums were in fact deducted from the insured's service pay while serving in the Marine Corps [R. 24, 35], and there is at least a question as to whether service pay may be considered earnings, for, as pointed out in *Johnson v. Shelton, supra:*

> In one aspect such pay represents a gift by the government rather than earnings, because the Government can compel any person to serve in its armed services without pay (*United States v. Williams,* 302 U. S. 46). In the *Williams* case the court said:
>
> "Enlistment is more than a contract, it effects a change of status. It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely dispose of their pay."

But, aside from the question as to whether service pay may be considered earnings within the meaning of the community property laws of California, and regardless of whether the premiums are paid by the insured or the beneficiary named in a Government insurance contract, the proceeds of the policy must be paid, in accordance with the terms of the contract, to the designated beneficiary. *Von Der Lippi-Lipski v. United States, supra; United States v. Sterling, supra; Murphy v. United States,* 5 Fed. Supp. 583 (D. C. Mass.); *Lewis v. United States, supra.*

II.

A Trust May Not Be Impressed Upon National Service Life Insurance by Virtue of the Community Property Laws of the State of California.

Appellant's contention that a trust was created in her favor by virtue of the California community property laws is but another way of stating that National Service Life Insurance is subject to the community property laws, and, for the reasons already stated, this may not be done. Clearly this would be a violation of Section 454a, *supra*. *Johnson v. Shelton*, Memorandum Ruling No. 522,648 (Superior Court of State of California, County of Los Angeles); *Barton v. United States*, 75 Fed. Supp. 703 (S. D. Calif.). As stated in *Johnson v. Shelton, supra:*

> Likewise the act expressly provides that the proceeds of a policy may be paid only to the beneficiary designated in the policy and that "payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." *For this court to impress a trust on the funds as they are received by the mother is to run directly into the teeth of the statute.* (Italics supplied.)

Federal control of title to the proceeds of Government insurance, both before and after payment by the Government, has been consistently recognized and enforced. *Lawrence v. Shaw*, 300 U. S. 245; *Pagel v. Pagel*, 291 U. S. 473; *Lewis v. United States*, 56 F. 2d 563 (C. C. A. 3d); *Culp v. Webster*, 25 Cal. App. 2d Supp. 759, 70 P. 2d 273.

The case of *Wissner v. Wissner,* 89 A. C. A. 857, 201 P. 2d 837, upon which the appellant relies, we submit, should not be followed, for the reason succinctly stated in *Johnson v. Shelton, supra,* as follows:

> It is said, however, in *Wissner v. Wissner,* that to deprive a widow of her vested right under State law to receive one-half the proceeds of a Federal life insurance policy where the premiums are paid out of community funds is contrary to the Fifth Amendment. But this contention appears to be fully answered by Justice Holmes in speaking for the court in *White v. United States,* 270 U. S. 175, 70 L. Ed. 530, and by Chief Justice Hughes speaking for the court in *Lawrence v. Shaw,* 300 U. S. 245, 81 L. Ed. 623, neither of which cases are cited in the *Wissner* case. * * *.

Also, it is desired to invite the court's attention to the fact that the United States was not a party to, and did not participate in, the *Wissner* case, and the court apparently was not fully apprised of the Government's position. In still another case, decided by the Superior Court of the State of California in and for the County of Los Angeles (*Nobles v. Cannell,* No. 502-587), in which a similar situation obtained, and the court first reached the same conclusion as in *Wissner*, the United States Attorney filed a memorandum of points and authorities, as *amicus curiae,* when the party adversely affected moved to have the court's Opinion changed, and after further hearing, the court reversed its previous stand, concluding that, as a matter of law:

> the community property laws of the State of California confer no rights on plaintiff to share in the proceeds of the policy involved in this action since

> it was the purpose of the Congress of the United States to provide in all details for the issuance and administration and settlement of National Service Life Insurance on a National basis, and state laws or their administration may not interfere with the carrying out of a National purpose.

This appellee is advised that petition for hearing in the Supreme Court of California in the *Wissner* case was denied by said Court on March 21, 1949.

No Provision for Trusts in National Service Life Insurance Act.

The National Service Life Insurance Act of 1940, as amended, made no provision for the creation of trusts on National Service Life Insurance policies, and its provisions limiting payments to a restricted permitted class of beneficiaries, and providing for settlement in cases of beneficiaries thirty or more years of age (Section 802(h)(2), Title 38, U. S. C. A.), in equal monthly installments for 120 months certain, continuing during the lifetime of such beneficiary or upon the refund life income plan, both of which require computation of the annuity based on the beneficiary's attained age, are wholly inconsistent with any notion that a trust could properly be imposed with respect to such payments. The history of subsequent legislation makes this quite clear. Public Law 589, 79th Congress (60 Stat. 781, *et seq.*), was approved on August 1, 1946. It amended a number of the Act's provisions and added many others. Among those added was Section 802(t), which provided four optional modes of settlement in lieu of the two modes theretofore allowed. The two which were carried forward were those above mentioned, and

they appear as (3) and (4) in said Section 802(t), which provides, in part, as follows:

> Options (3) and (4) shall not be available if any firm, corporation, legal entity (including the estate of the insured), *or trustee is beneficiary,* or in any case in which an endowment contract matures by reason of the completion of the endowment period. (Italics supplied.)

The restrictive sentence above quoted was necessary only because (1) the prior limitations upon the permitted class of beneficiaries were removed by the Act, and (2) options other than (3) and (4) had been added which were susceptible of payments to corporations, trustees and the like, so that the restrictive provision became necessary where it had not been required before. A report of the Senate Committee on Finance (Report 1705, 79th Congress, see H. R. 6371) contains language identical with that appearing in the H. R. 2002, which must be taken into account in connection with this matter. As to Section 602(t), it states, in part, on page 6, as follows:

> It is also provided that the Options (3) and (4) above outlined shall not be available if any firm, corporation, legal entity (including the estate of the insured), or trustee is beneficiary, or in any case in which an endowment contract matures by reason of the completion of the endowment period. The restrictions against selection of Options (3) and (4) by a firm, corporation, legal entity, or trustee is deemed necessary because payments in such cases could not be based on the life of an individual and because if insurance payments were conditioned on the life

> of any individual other than the payee it would be necessary to determine such individuals as alive at the time such installments are payable.

Thus, it seems clear that a trust may not be impressed upon National Service Life Insurance, and the cases involving trusts on war risk term insurance and United States Government insurance, upon which the appellant relies (*Calhoun v. Ussery,* 46 F. 2d 495 (W. D. La.); *Ambrose v. United States,* 15 F. 2d 52 (W. D. N. Y.); *Kaschefsky v. Kaschefsky,* 110 F. 2d 836 (C. C. A. 6th)), are not in point, since they do not relate to contracts of National Service Life Insurance and differ therefrom in the particulars mentioned. Furthermore, the trusts involved in said cases were not predicated upon rights claimed to have been acquired under Government insurance contracts by virtue of State community property laws. And all of said cases did involve some expression on the part of the insured or evidence with regard to a trust, whereas no such expression or evidence was claimed by the appellant in the present case and none shown to exist. The *Kaschefsky* case, which appellant also cites in her brief (p. 13) as authority for the statement "that Clyde, in applying for a $10,000 single policy, could *name* but *one* principal beneficiary," is not authority for such a statement, and the statement is incorrect, for the insured could (and many veterans did) designate more than one principal beneficiary. Section 602(g), *supra,* providing that: "The insured shall have the right to designate the beneficiary or beneficiaries * * *."

Appellee Is Not Required to Assign.

Contrary to appellant's contention, the named beneficiary (Lilly Pack) may not be required to make an assignment of one-half interest to the appellant, for the reason that, under the provisions of Section 454a, *supra*, the proceeds of this insurance contract were not assignable, the pertinent statutory provision expressly stating that "Payments of benefits due or to become due shall not be assignable * * *." This statutory provision not only did not sanction or permit an assignment, but expressly prohibited one, and was in force at the time this insurance contract matured, on June 11, 1945. The amendment of August 1, 1946, c. 728, 60 Stat. 788 (38 U. S. C. A., Sec. 816), provides for an assignment as follows:

> That assignments of all or any part of the beneficiary's interest may be made by a designated beneficiary to a widow, widower, child, father, mother, grandfather, grandmother, brother, or sister of the insured, when the designated contingent beneficiary, if any, joins the beneficiary in the assignment, and if the assignment is delivered to the Veterans' Administration before any payments of the insurance shall have been made to the beneficiary: * * *.

This amendment permits a voluntary assignment by the designated beneficiary on the conditions stated, but certainly does not require one, and there is no authority of law to compel the appellee, Lilly Pack, to make an assignment in favor of the appellant.

Conclusion.

For the reasons mentioned, it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

James M. Carter,
United States Attorney,

Ernest A. Tolin,
Assistant United States Attorney,

Clyde C. Downing,
Assistant United States Attorney,

Robert Komins,
Assistant United States Attorney,

H. G. Morison,
Assistant Attorney General,

D. Vance Swann,
Attorney, Department of Justice,

Thomas E. Walsh,
Attorney, Department of Justice.

March, 1949.

APPENDIX.

Memorandum Ruling.

No. 522,648.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Daisy Edda Johnson, plaintiff, vs. Ada Shelton, defendant.

The controversy in this case relates to the relative rights of a widow and a mother of a deceased veteran of World War II to the monthly payments being made by the federal government under a War Service insurance policy. The widow of the veteran contends that while the policy designates the mother as the sole beneficiary, it was taken out during the deceased veteran's marriage to the widow, the plaintiff here, and hence, under our community laws, she is entitled to reach one-half of the proceeds of the policy by making the mother a trustee thereof for the plaintiff. The mother did not answer the complaint and hence her default was duly entered. Under the law of this state the default operates as an admission by the mother of the truth of the cause of action as set up in the complaint and of every material and traversible allegation therein which is well and properly pleaded, but the default does not admit that the facts alleged are in law sufficient to constitute a good cause of action or to entitle plaintiff to the relief prayed. Moreover, where the cause of action is predicated upon a document the terms of the document control over any contrary averments set forth in the complaint.

The right of the plaintiff to recover is based upon the fact that the community funds of the decedent and the

plaintiff, his widow, were used to pay the premiums on the policy issued by the federal government, and hence, under the community laws of this state, of which the decedent was a resident, one-half of the proceeds are payable to the surviving widow. This, of course, is the rule with respect to life insurance policies issued by private corporations. We turn then to consider whether the rule is the same or otherwise with respect to life insurance policies issued by the federal government.

That the rule is otherwise is the holding of Judge Mathes in Barton v. United States, 75 Fed. Supp. 703; that the rule is not otherwise is the holding of Presiding Justice Adams in Wissner v. Wissner, 89 A. C. A. 857. In view of that conflict of opinion, the question at once is presented whether the Wissner case is a controlling precedent upon this court if there are, as appears to be the case, decisions to the contrary by the Supreme Court of the United States.

In McCulloch v. Maryland, 4 Wheaton, 316, Chief Justice Marshall said:

". . . The People of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that questions must arise between these governments thus constituted, it became of great moment to determine upon what principle these questions should be decided, and who should decide them. The

constitution, therefore, declares that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding."

In the case before us the policy of insurance was issued by the federal government pursuant to a congressional act. To the extent then that any state law conflicts with this act of Congress it is of necessity void and of no effect. The act in question permitted a veteran to apply for a policy of insurance, but restricted his designations of beneficiaries to certain persons, among others a wife or mother. Likewise the act expressly provides that the proceeds of a policy may be paid only to the beneficiary designated in the policy and that "payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary." For this court to impress a trust on the funds as they are received by the mother is to run directly into the teeth of the statute.

It is said, however, in Wissner v. Wissner that to deprive a widow of her vested right under state law to receive one-half the proceeds of a federal life insurance policy where the premiums are paid out of community funds is contrary to the Fifth Amendment. But this contention appears to be fully answered by Justice Holmes in speaking for the court in White v. U. S., 270 U. S. 175, 70 L. Ed. 530, and by Chief Justice Hughes speaking for the court in Lawrence v. Shaw, 300 U. S. 245, 81 L. Ed. 623, neither of which cases are cited in the Wissner case. The White case involved a federal service insurance policy issued in 1918. Under the act under which the policy was issued a veteran could not designate an aunt along with his mother as a beneficiary as he wished to do. Accordingly, he designated his mother the beneficiary, but left a will providing that one-half of the sums paid to his mother should go to his aunt. Under the statute, as it existed at the time of the veteran's death, the provision in favor of the aunt was unenforceable. However, a year later Congress passed an act amending the statute so as to permit payments to persons in the class of aunts and additionally made the statute retroactive as of the date of the enactment of the original statute pursuant to a reservation contained in the original statute. The court held that the amendment of the statute did not violate any rights of the mother under the Fifth Amendment. The court said: "The insurance was a contract, to be sure, for which a premium was paid, but it was not one entered into by the United States for gain. All soldiers were given a right

to it, and the relation of the government to them, if not paternal, was at least avuncular . . . The only relations of contract were between the government and him. White's mother's interest at his death was vested only so far as he and the government had made it so, and was subject to any conditions upon which they might agree."

In Lawrence v. Shaw, *supra,* it was held that the federal government could exempt the proceeds of a veteran's policy from state taxation despite the state's laws to the contrary. That being true, it would seem to follow that state community laws cannot fare any better. Moreover, it should be observed that in the instant case the insurance premiums were paid by deducting their amount from the pay of the veteran. In one aspect such pay represents a gift by the government rather than earnings, because the government can compel any person to serve in its armed services without pay (United States v. Williams, 302 U. S. 46). In the Williams case the court said:

> "Enlistment is more than a contract, it effects a change of status. It operates to emancipate minors at least to the extent that by enlistment they become bound to serve subject to rules governing enlisted men and entitled to have and freely to dispose of their pay."

In view of the foregoing decisions of the United States Supreme Court it follows that judgment must be entered for the defendant.

Clarence M. Hanson,

Judge.

No. 6061-BH.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In the District Court of the United States, in and for the Southern District of California, Central Division.

Anna M. James, plaintiff, v. United States of America, William H. James, William H. James and Agnes James, as custodians for Bobby Ray James, a minor, Doe One, Doe Two and Doe Three, defendants.

The above entitled cause having come on regularly for trial on the 5th day of June, 1947, before the Honorable Ben Harrison, Judge of the above entitled Court, sitting without a jury, a jury having been expressly waived by all of the parties; * * * and the Court having heard all of the testimony and having examined the documentary evidence offered by the parties, and the cause having been submitted for decision, and the Court being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court finds as follows:

I.

The plaintiff, *Anna M. James,* is the widow of the insured soldier, *Robert L. James.* The defendant, the *United States of America* is the insurer, the defendant, *William H. James,* is the father of the deceased insured, *Agnes James* is the divorced wife of the deceased insured, *Robert L. James,* and the mother and the legal guardian of *Bobby Ray James. Agnes James* has had her name changed to her present name, Diane C. James. That by

stipulation of parties, the minor *Bobby Ray James* was made a defendant to said action.

II.

That the plaintiff and the insured, Robert L. James, were married in the State of Arkansas on April 8, 1942, and that at all times thereafter until the death of the insured, they remained husband and wife.

That subsequent thereto, and on June 8, 1942, the insured, Robert L. James, enlisted, or was inducted into active service of the United States Army and continued therein until his death on June 21, 1944.

That on July 8, 1942, the insured applied for and was granted a policy of United States government life insurance, No. N3-101-428 in the sum of $5,000.00, naming as principal beneficiary thereof, William H. James, described as father, and as contingent beneficiary, Bobby Ray James, described as son. Said insurance contract became effective on August 1, 1942, and that the insured paid the premiums thereon by deductions from his service pay to and including the date of his death, therefore, said insurance contract was in full force and effect at said time.

That on the same day, that is to say, on July 8, 1942, the insured applied for and was granted an additional contract of National Service Life Insurance in the sum of $5,000.00, No. N3-111-499, effective August 1, 1942, naming as the principal beneficiary thereof, Anna M. James, described as wife, and as the contingent beneficiary, Bobby Ray James, described as son. That the insured paid the premiums on said policy during the period of service by deductions from his service pay to and including the date of death.

That on March 16, 1944, the insured filed a change of beneficiary on the official form provided by the War Department for that purpose, wherein he made his father, William H. James, as principal beneficiary, on a policy No. N3-101-428, and his son, Bobby Ray James, as the contingent beneficiary thereof, and on the second policy No. N3-111-499 he named as principal beneficiary, his son, Bobby Ray James, and as contingent beneficiary, his wife, Mrs. Anna May James, the plaintiff herein; both policies were in full force and effect at the date of death. The numbers on said policies have apparently been transposed or used interchangeably, but the same does not affect them in any manner whatsoever.

That the insured was reported missing in action June 21, 1944, evidence of his death was received by the War Department and date of death was established as of June 21, 1944. See War Department Form No. 52-1, dated May 29, 1945.

* * * * * * * * *

IV.

The Court further finds that prior to the date of decedent's marriage to the plaintiff, Anna M. James, the said decedent was, and had held his legal residence in the County of Dallas, State of Texas, and that said residence continued to be the residence of the decedent and plaintiff to the date of his death. That plaintiff is now a resident of the County of Los Angeles, State of California.

V.

The Court further finds that, except as hereinafter qualified, the Community Property Laws of the State of Texas govern as to the management, control and disposition of the community property of the plaintiff and the

decedent and that no fraud is alleged or proven to have been practiced either by the decedent against the plaintiff or by the plaintiff against the decedent.

VI.

That the contracts of insurance sued upon herein were issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, and that the laws of the United States of America relating to such contracts of insurance are paramount in the naming of or changing of beneficiaries by an insured thereunder, and with respect to the disposition of the proceeds of said contracts of insurance, and that said National Service Life Insurance Act of 1940, as amended, and all regulations promulgated pursuant to the authority granted by said statute are not affected, modified or controlled by any state laws or regulations to the contrary.

* * * * * * * * *

Conclusions of Law.

The Court makes the following Conclusions of Law from the foregoing facts:

* * * * * * * * *

II.

That the residence of the plaintiff and her deceased husband was, prior to his death, in the County of Dallas, State of Texas.

III.

That under the contracts of insurance sued upon herein issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, the insured had

the absolute right to make a designation or change of designation of beneficiary, within the permitted class, without the consent of the plaintiff wife.

IV.

That the right to name or change the beneficiary thus conferred by federal statute is not subject to and cannot be affected, modified or controlled by any state community property laws.

V.

That the disposition of the proceeds or benefits of any contracts of insurance issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, is not subject to and cannot be controlled or governed by the community property laws of any state.

VI.

That under the Community Property Laws of the State of Texas, where there is no intention on the part of the husband to defraud a wife, the proceeds of a policy on the life of the husband vested in the beneficiary named in the policy upon the death of the insured husband even though the policy was taken out during coverture, by the husband, and the premiums were paid out of community funds.

VII.

That the plaintiff is not entitled to any relief either as prayed for in the Complaint or as shown by the facts proven.

VIII.

That neither the plaintiff's Complaint nor the facts proven state or prove a claim against any of the defendants herein upon which relief can be granted.

IX.

That the plaintiff has no right or claim in or to either of the insurance policies sued on herein or in or to any of the proceeds thereof, save and except as the same may hereafter accrue to her as the contingent beneficiary where so named.

* * * * * * * * *

Dated: June 16th, 1947.

/s/ Ben Harrison,
United States District Judge.